

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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INDEMNITY INSURANCE COMPANY OF
NORTH AMERICA, a/s/o NCR
CORPORATION,

Civil Action No. 08-CV-00008
(LAP) (DFE)

Plaintiffs,

-against-

**ANSWER OF BRITISH
AIRWAYS PLC TO THE
THIRD-PARTY COMPLAINT**

UNITED PARCEL SERVICE, INC. and UPS
SUPPLY CHAIN SOLUTIONS, INC.,

Defendants.

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UNITED PARCEL SERVICE, INC. and UPS SUPPLY
CHAIN SOLUTIONS, INC.,

Third-Party Plaintiffs,

- against -

BRITISH AIRWAYS PLC, CHINA AIRLINES LTD.,
DOES 1-10, inclusive,

Third-Party Defendants.

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Defendant BRITISH AIRWAYS PLC (hereinafter "BRITISH AIRWAYS"), by
and through its attorneys, Clyde & Co US LLP, for its Answer to the Third-Party Complaint
states upon information and belief as follows:

1. BRITISH AIRWAYS denies paragraphs 1 through 34, inclusive, which
relate solely to Defendants/Third-Party Plaintiffs' Answer to Plaintiff's Complaint and are
unrelated to the Third-Party Complaint.

JURISDICTION

2. Denies the allegations set forth in paragraph 35 of the Third-Party Complaint.

GENERAL ALLEGATIONS

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs 36, 38, 39 and 41 of the Third-Party Complaint.

4. Denies the allegations set forth in paragraph 37 of the Third-Party Complaint, except admits that BRITISH AIRWAYS is a duly authorized foreign air carrier engaged in the business of the international carriage by air of passengers, baggage and cargo, organized and existing under the laws of the United Kingdom, maintains its principal place of business in the United Kingdom and a place of business in the State of New York, and respectfully leaves all questions of law for the Court.

5. Denies the allegations set forth in paragraphs 40 and 42 of the Third-Party Complaint as they pertain to BRITISH AIRWAYS, and denies knowledge or information sufficient to form a belief as to the truth of the allegations as set forth against all other Third-Party Defendants.

AS TO THE ALLEGED FIRST CAUSE OF ACTION

6. Answering paragraph 43 of the Third-Party Complaint, BRITISH AIRWAYS repeats, reiterates and realleges each and every allegation, admission and denial in paragraphs 1 through 5, inclusive, of this Answer with the same force and effect as if herein set forth in full.

7. Denies the allegations set forth in paragraphs 44, 45 and 46 of the Third-Party Complaint as they pertain to BRITISH AIRWAYS, and denies knowledge or information

sufficient to form a belief as to the truth of the allegations as set forth against all other Third-Party Defendants.

AS TO THE ALLEGED SECOND CAUSE OF ACTION

8. Answering paragraph 47 of the Third-Party Complaint, BRITISH AIRWAYS repeats, reiterates and realleges each and every allegation, admission and denial in paragraphs 1 through 7, inclusive, of this Answer with the same force and effect as if herein set forth in full.

9. Denies the allegations set forth in paragraphs 48 through 51, inclusive, of the Third-Party Complaint as they pertain to BRITISH AIRWAYS, and denies knowledge or information sufficient to form a belief as to the truth of the allegations as set forth against all other Third-Party Defendants.

AS TO THE ALLEGED THIRD CAUSE OF ACTION

10. Answering paragraph 52 of the Third-Party Complaint, BRITISH AIRWAYS repeats, reiterates and realleges each and every allegation, admission and denial in paragraphs 1 through 9, inclusive, of this Answer with the same force and effect as if herein set forth in full.

11. Denies the allegations set forth in paragraphs 53 through 56, inclusive, of the Third-Party Complaint as they pertain to BRITISH AIRWAYS, and denies knowledge or information sufficient to form a belief as to the truth of the allegations as set forth against all other Third-Party Defendants.

**AS AND FOR A FIRST
AFFIRMATIVE DEFENSE**

12. The Third-Party Complaint fails to state a claim against BRITISH AIRWAYS upon which relief can be granted.

**AS AND FOR A SECOND
AFFIRMATIVE DEFENSE**

13. If BRITISH AIRWAYS provided any of the alleged transportation, the transportation out of which the subject matter of this action arose was "international carriage" within the meaning of a treaty of the United States known as the Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999, ICAO Doc. No. 9740 (entered into force November 4, 2003), *reprinted in* S. Treaty Doc. 106-45, 1999 WL 333292734 (hereinafter "Montreal Convention"), and the rights of the parties are governed exclusively by the provisions of the Montreal Convention.

**AS AND FOR A THIRD
AFFIRMATIVE DEFENSE**

14. The liability of BRITISH AIRWAYS, if any, is limited pursuant to Article 22 of the Montreal Convention and/or BRITISH AIRWAYS' tariffs and conditions of carriage as set forth in the relevant contract of carriage.

**AS AND FOR A FOURTH
AFFIRMATIVE DEFENSE**

15. Pursuant to its tariffs and conditions of carriage as set forth in the relevant contract of carriage, and/or the applicable local law, BRITISH AIRWAYS is not liable to Third-Party Plaintiffs or, in the alternative, BRITISH AIRWAYS' liability is limited.

**AS AND FOR A FIFTH
AFFIRMATIVE DEFENSE**

16. The alleged damages complained of were caused or contributed to by the negligence of parties other than BRITISH AIRWAYS and for whom BRITISH AIRWAYS is not responsible and, therefore, BRITISH AIRWAYS is not liable to Third-Party Plaintiffs.

**AS AND FOR A SIXTH
AFFIRMATIVE DEFENSE**

17. The alleged damages complained of were not proximately caused by any negligence or culpable conduct on the part of BRITISH AIRWAYS.

**AS AND FOR A SEVENTH
AFFIRMATIVE DEFENSE**

18. BRITISH AIRWAYS is not liable to Third-Party Plaintiffs for the loss or damage described in the Third-Party Complaint because the alleged loss or damage was caused or contributed to by the negligence of Third-Party Plaintiffs or its agents, servants or employees.

**AS AND FOR AN EIGHTH
AFFIRMATIVE DEFENSE**

19. Third-Party Plaintiffs failed to mitigate their damages, if any, and, therefore, Third-Party Plaintiffs are barred from recovering any such damages from BRITISH AIRWAYS.

**AS AND FOR A NINTH
AFFIRMATIVE DEFENSE**

20. The alleged damages were caused and brought about by an intervening and superseding cause and were not caused by BRITISH AIRWAYS, or by a person for whom BRITISH AIRWAYS is responsible.

**AS AND FOR A TENTH
AFFIRMATIVE DEFENSE**

21. Pursuant to the Montreal Convention, BRITISH AIRWAYS' tariffs and conditions of carriage as set forth in the relevant contract of carriage and/or other relevant law, BRITISH AIRWAYS is not liable to Third-Party Plaintiffs for the loss or damage described in the Third-Party Complaint because the alleged loss or damage (a) did not occur during the period of carriage by air, and/or (b) was caused or contributed to by an inherent defect, quality or vice of the cargo, defective packaging of the cargo and/or the negligence of Third-Party Plaintiffs, their agents,

servants, or employees.

**AS AN FOR AN ELEVENTH
AFFIRMATIVE DEFENSE**

22. BRITISH AIRWAYS is not liable to Third-Party Plaintiffs as BRITISH AIRWAYS fully satisfied its obligations under the contract.

**AS AN FOR A TWELFTH
AFFIRMATIVE DEFENSE**

23. Pursuant to Article 33 of the Montreal Convention, this Court lacks treaty jurisdiction and therefore lacks subject matter jurisdiction of the claims asserted by Third-Party Plaintiffs in this action as against BRITISH AIRWAYS.

**AS AN FOR A THIRTEENTH
AFFIRMATIVE DEFENSE**

24. Third-Party Plaintiffs' claims are time barred by the two-year period of limitations set forth by Article 35 of the Montreal Convention and/or defendant BRITISH AIRWAYS' conditions of contract and, therefore, Third-Party Plaintiffs' claims must be dismissed.

**AS AN FOR A FOURTEENTH
AFFIRMATIVE DEFENSE**

25. Pursuant to the Montreal Convention, BRITISH AIRWAYS is not liable to Third-Party Plaintiffs because BRITISH AIRWAYS took all necessary measures to prevent the loss.

**AS AN FOR A FIFTEENTH
AFFIRMATIVE DEFENSE**

26. The Third-Party Complaint should be dismissed pursuant to the doctrine of *forum non conveniens*.

**AS AN FOR A SIXTEENTH
AFFIRMATIVE DEFENSE**

27. The Third-Party Complaint should be dismissed for improper venue.

NOTICE OF APPLICABILITY OF FOREIGN LAW

28. Pursuant to Rule 44.1 of the Federal Rules of Civil Procedure, BRITISH AIRWAYS hereby gives notice that it may raise issues concerning the law of a foreign country in this matter.

WHEREFORE, Third-Party Defendant BRITISH AIRWAYS PLC demands judgment dismissing the Third-Party Complaint in its entirety or, alternatively, judgment limiting its liability pursuant to the forgoing, along with such further and different relief as this Court may deem just and proper.

Dated: New York, New York
May 27, 2008

Yours, etc.,

CLYDE & CO US LLP

By: 

Diane Westwood Wilson (DW 0520)
Attorneys for Third-Party Defendant
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